IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.1139 OF 2004

Jagdish Natvarlal Mehta ...Appellant
Vs.
The Municipal Commissioner & Ors. ...Respondents

Mr.K.A.Sampat for the Appellant
Ms Geeta Jogalekar for Respondent Nos.1 to 3 and 5
Mr.R.S.Mishra for the Respondent Nos.7 & 8
Mr.Chandrakant for Respondent No.14
Mr.Rajesh Kachare for Respondent Nos.9 to 13 and 16 to 19.

CORAM: A.S.OKA, J.
DATED: MAY 3,2005.

P.C.:

1. Admit. Advocate for Respondent Nos.7 and 8 waives service. Advocate for Respondent Nos.9 to 13 and 16 to 19 waives service. Advocate for Respondent Nos.1 to 3 and 5 waives service.

2. Shri Sampat makes a statement that the Appellant is not pressing prayer clauses (a), (b-i), (b-ii) and (c) in the Notice of Motion No.2873 of 2001 and therefore service on rest of the Respondents is dispensed with.

3. Notice of Motion No.2873 of 2001 is taken out by the original Plaintiffs. The case of the Original Plaintiffs is that the Respondent No.5-Corporation has committed a breach of order dated 3rd October 1996 passed by the Trial Court in Notice of Motion No.6791 of 1993 as modified by order dated 31st October 1996 passed by this Court in C.A.No.6606 of 1996 in A.O.No.1225 of 1996. Shri Sampat for the Appellant submitted that no reply was filed by the Respondent No.5-Corporation to the Notice of Motion. Though no reply

was filed by the Corporation to the Notice of Motion, the learned Trial Judge has recorded a finding that there is no violation of order on the part of Municipal Corporation. He submitted that considering the prayer clause (b-iii) made in the Notice of Motion, the Respondent No.5-Corporation ought to have filed a reply and ought to have pointed out the manner in which the earlier order passed by the Trial Court was complied with. He submitted that the learned Trial Judge has committed an error by holding that as the breach having surfaced in 1993 on the point of limitation also Notice of Motion will not survive. The learned Advocate for the Respondent No.5-Corporation submitted that on the basis of material on record there is a finding recorded regarding the compliance of earlier order and hence no interference is called for.

4. The prayer (b-iii) in the Notice of Motion is for striking out the defence of the Respondent No.5 for committing breach of earlier order passed by the Trial Court. Now it is well settled that provision of Rule 11 of Order XXXIX of the Code of Civil Procedure, 1908 is not mandatory but is directory. If the party-Defendant has committed breach of order passed by the Court, there is power vesting in the Court to strike out defence of the said Defendant.

5. In the present case the Respondent No.5-Corporation did not file any reply to the Notice of Motion pointing out that there is compliance with the earlier order passed by the Trial Court. The learned Judge has observed that the breach

having surfaced in 1993, on the point of limitation, Notice of Motion will not survive. If breach of the order is committed, delay in taking out Notice of Motion is only a factor to be considered by the trial Court. Only on the ground of delay, the prayer made under Order XXXIX Rule 11 cannot be defeated.

6. As the case of the original Plaintiffs on the basis of prayer clause (b-iii) is not considered on merits and as Respondent No.5 had not filed any reply to the Notice of Motion, case is made out for passing a limited order of remand.

7. Hence I pass the following order :

i) That part of the impugned order by which Notice of Motion No.2873 of 2001 is dismissed is set aside and Notice of Motion No.2873 of 2001 is restored only in so far as prayer clause (b-iii) made therein is concerned. In so far as it relates to prayers (a), (b-i), (b-ii) and (c), it stands dismissed as not pressed.

ii) It will be open to the Respondent No.5-Corporation to file a reply to the Notice of Motion on or before 17th June 2005. The Notice of Motion will be decided expeditiously.

All contentions of the parties on merits are kept open.

iii) Parties to act upon an authenticated copy of this order.

Judge.